

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

STEPHANIE L. ENGER,

Plaintiff,

V.

CAROLYN W. COLVIN, Acting
Commissioner of the Social Security
Administration.

Defendant.

CASE NO. 14-cv-05317 JRC

ORDER ON PLAINTIFF'S COMPLAINT

Defendant.

This Court has jurisdiction pursuant to 28 U.S.C. § 636(c), Fed. R. Civ. P. 73 and Local Magistrate Judge Rule MJR 13 (*see also* Notice of Initial Assignment to a U.S. Magistrate Judge and Consent Form, ECF No. 3; Consent to Proceed Before a United States Magistrate Judge, ECF No. 4). This matter has been fully briefed (*see* ECF Nos. 11, 12, 13).

After considering and reviewing the record, the Court finds that the ALJ failed to provide a specific and legitimate reason for her failure to credit fully the opinions of an

1 examining doctor and a treating doctor. The ALJ indicated that she was not crediting
2 fully the opinion of the examining doctor because of a finding that the doctor relied on a
3 “snapshot” of plaintiff’s functioning, as the examining doctor only examined plaintiff on
4 one occasion. However, as the ALJ discounted this doctor’s opinion in favor of the
5 opinions of doctors who never examined plaintiff at all, this reason is not legitimate.
6 Similarly, the ALJ discounted the treating doctor’s opinion in favor of non-examining
7 state agency medical consultants with a finding that “it was based on a brief treatment
8 relationship, which was insufficient to assess the claimant’s functional limitations” (Tr.
9 23). As the opinions relied on by the ALJ were provided by doctors with no treatment
10 relationship with plaintiff, and as plaintiff’s impairments are mental impairments most
11 effectively evaluated with an in-person evaluation, this reason is not legitimate. The ALJ
12 also erred by finding that both of these doctors relied heavily on plaintiff’s self-report
13 without citing any substantial evidence in the record to support such findings.
14

15 Therefore, this matter is reversed and remanded pursuant to sentence four of 42
16 U.S.C. § 405(g) to the Acting Commissioner for further administrative proceedings.
17

BACKGROUND

18 Plaintiff, STEPHANIE L. ENGER, was born in 1973 and was 36 years old on the
19 amended alleged date of disability onset of February 12, 2010 (*see* Tr. 34, 200, 206).
20 Plaintiff graduated from high school (Tr. 37). She has work experience as a floral
21 manager in a grocery store, shift supervisor in a fast food restaurant, cashier in a gas
22 station, housekeeper/laundry in a nursing home, waitress, bartender and cook at a bar and
23 grill, and sorter/stocker in a clothing store. Her last employment ended when it became
24

1 too hard to be around people and she was having a hard time keeping track of what she
2 had done (Tr. 38-42).

3 According to the ALJ, plaintiff has at least the severe impairments of “bipolar
4 disorder and anxiety disorder with panic and with agoraphobia (20 CFR 404.1520(c) and
5 416.920(c))” (Tr. 16).

6 At the time of the hearing, plaintiff was living with her husband, 14 year-old son
7 and 5 year-old daughter (Tr. 53-54).

PROCEDURAL HISTORY

8 Plaintiff’s applications for disability insurance (“DIB”) benefits pursuant to 42
9 U.S.C. § 423 (Title II) and Supplemental Security Income (“SSI”) benefits pursuant to 42
10 U.S.C. § 1382(a) (Title XVI) of the Social Security Act were denied initially and
11 following reconsideration (*see* Tr. 136-38, 139-42, 144-48, 149-55). Plaintiff’s requested
12 hearing was held before Administrative Law Judge Mattie Harvin Woode (“the ALJ”) on
13 November 8, 2012 (*see* Tr. 31-81). On November 27, 2012, the ALJ issued a written
14 decision in which the ALJ concluded that plaintiff was not disabled pursuant to the Social
15 Security Act (*see* Tr. 11-30).

16 In plaintiff’s Opening Brief, plaintiff raises the following issues: (1) Whether or
17 not the ALJ erred in rejecting the medical opinions of Mary Lemberg, M.D. and Michael
18 W. Johnson, M.D.; and (2) Whether or not the ALJ’s errors were harmless (*see* ECF No.
19 11, p. 1).

20 //

21 //

STANDARD OF REVIEW

Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of social security benefits if the ALJ's findings are based on legal error or not supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n.1 (9th Cir. 2005) (*citing Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1999)).

DISCUSSION

(1) Whether or not the ALJ erred in rejecting the medical opinions of Mary Lemberg, M.D. and Michael W. Johnson, M.D.

Plaintiff contends that the ALJ failed to provide specific and legitimate reasons for her failure to credit fully the opinions of examining psychiatrist, Dr. Mary Lemberg, M.D., as well as the opinions of treating physician, Dr. Michael W. Johnson, M.D. (*see* Opening Brief, ECF No. 11; *see also* Reply, ECF No. 13). Defendant contends that the ALJ's reasons are specific and legitimate and supported by substantial evidence in the record as a whole (*see* Response, ECF No. 12).

According to the Ninth Circuit, when a treating or examining physician's opinion is contradicted, that opinion can be rejected "for specific and legitimate reasons that are supported by substantial evidence in the record." *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1996) (citing *Andrews v. Shalala*, 53 F.3d 1035, 1043 (9th Cir. 1995); *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)).

11

44

1 A. Examining Psychiatrist, Dr. Mary Lemberg, M.D.

2 Dr. Lemberg examined plaintiff at the request of the Administration (*see* Tr. 376-
3 83). She indicated that she reviewed a psychiatric evaluation from May, 2010 (*see* Tr.
4 376). Dr. Lemberg took a detailed history (*see* Tr. 376-79). She also conducted a mental
5 status examination (*see* Tr. 379-80). For example, she observed that plaintiff was
6 nervous, more so at the beginning of the examination, and also observed that plaintiff's
7 hands were shaking (*see* Tr. 379). Dr. Lemberg observed that plaintiff correctly followed
8 a 3-step command, but demonstrated "some worry that she was performing it incorrectly"
9 (Tr. 380). Regarding her ability to spell world backwards, she had a "score of 3/5 on her
10 first attempt; [but] she ma[de] two other attempts after self-correcting herself and does
11 finally do this correctly" (*see id.*). Regarding plaintiff's activities of daily living, among
12 other things, Dr. Lemberg noted that plaintiff "only shops at one store where she knows
13 all the employees" (*see id.*). She also noted that plaintiff reported that "she does not
14 watch TV because it overwhelms her and does not make sense" (*see* Tr. 381).

16 Among other diagnoses, Dr. Lemberg diagnosed plaintiff with "Bipolar I disorder,
17 most recent episode depressed, severe, rule out schizoaffective disorder;" panic disorder
18 with agoraphobia; and, social phobia (*see id.*). Dr. Lemberg opined that plaintiff was
19 suffering from "fairly significant symptoms that limit her ability to function at times"
20 (*see id.*). Dr. Lemberg also opined that plaintiff's "condition will not likely improve
21 further within the next 12 months" (*id.*). Dr. Lemberg opined that plaintiff "would find it
22 difficult to adapt to new environments" and Dr. Lemberg specified that this opinion was
23 "based on our interview today and mental status exam" (*see* Tr. 382). Dr. Lemberg

1 further opined that plaintiff “cannot perform work activities on a consistent basis or
2 complete a normal workweek without problematic interruption from her psychiatric
3 conditions after working for a period of time” (*see id.*). Dr. Lemberg indicated that she
4 anticipated that plaintiff “would have significant difficulty dealing with the usual stress
5 encountered in a competitive work environment” (*see id.*).
6

7 The ALJ gave “little weight to Dr. Lemberg’s statements that the claimant would
8 not be able to work on a consistent basis and would have significant difficulty dealing
9 with the stress of a competitive work environment” (*see Tr. 23*). The ALJ provided two
10 reasons for giving little weight to these opinions by Dr. Lemberg (*see id.*). First, the ALJ
11 indicated that these opinions from Dr. Lemberg appear to be an “overstatement of the
12 claimant’s limitations based on a snapshot of the claimant’s individual functioning” (*see
id.*).
13

14 If the ALJ was discrediting the opinions from Dr. Lemberg on the basis of a
15 “snapshot” of plaintiff’s functioning at one examination in favor of a doctor who
16 examined plaintiff more than once, or in favor of a treating doctor, this reason would
17 have some legitimacy. However, for her RFC determination, the ALJ relied on two state
18 agency psychological consultants who never examined plaintiff, but only reviewed her
19 records (*see Tr. 22-23; see also Tr. 19*). In addition, plaintiff’s impairments are mental
20 impairments, which are more amenable to evaluation by an in-person examination. *See*
21 Paula T. Trzepacz and Robert W. Baker, *The Psychiatric Mental Status Examination* 3
22 (Oxford University Press 1993) (“experienced clinicians attend to detail and subtlety in
23 behavior, such as the affect accompanying thought or ideas, the significance of gesture or
24

1 mannerism, and the unspoken message of conversation”). Therefore, the fact that Dr.
2 Lemberg examined plaintiff only once and had only a “snapshot” of her functioning is
3 not a legitimate reason for the ALJ’s failure to credit fully the opinion of examining
4 psychiatrist Dr. Lemberg in favor of opinions from nonexamining doctors. According to
5 the Ninth Circuit, an examining physician’s opinion is “entitled to greater weight than the
6 opinion of a nonexamining physician.” *Lester, supra*, 81 F.3d at 830 (citations omitted);
7 *see also* 20 C.F.R. § 404.1527(c)(1) (“Generally, we give more weight to the opinion of a
8 source who has examined you than to the opinion of a source who has not examined
9 you”).

10 The second reason provided by the ALJ for her failure to credit fully some of the
11 opinions of Dr. Lemberg was the ALJ’s finding that Dr. Lemberg’s opinion “relies
12 heavily on the claimant’s subjective report of her symptoms” (*see* Tr. 23). The ALJ
13 provides no evidence for this finding. Based on a review of the relevant record, there
14 does not appear to be substantial evidence in support of this finding by the ALJ of a
15 heavy reliance by Dr. Lemberg on plaintiff’s subjective report. Furthermore, the Court
16 notes that when opining that plaintiff “would find it difficult to adapt to new
17 environments,” Dr. Lemberg specified that this opinion was “based on our interview
18 today and mental status exam” (*see* Tr. 382). Although Dr. Lemberg did not indicate
19 specifically the basis for her opinions regarding plaintiff’s inability to work on a
20 consistent basis and her significant difficulty dealing with stress and competitive work
21 environment, the finding by the ALJ that these opinions were “heavily” based on
22
23
24

1 plaintiff's subjective report is not a logical inference based on the record, but appears to
2 be mere speculation.

3 An ALJ may "draw inferences logically flowing from the evidence." *Sample v.*
4 *Schweiker*, 694 F.2d 639, 642 (9th Cir. 1999) (*citing Beane v. Richardson*, 457 F.2d 758
5 (9th Cir. 1972); *Wade v. Harris*, 509 F. Supp. 19, 20 (N.D. Cal. 1980)). However, an ALJ
6 may not speculate. *See* SSR 86-8, 1986 SSR LEXIS 15 at *22.

7 Furthermore, the MSE is not generally considered "subjective." "Like the physical
8 examination, the Mental Status Examination is termed the *objective* portion of the patient
9 evaluation." Paula T. Trzepacz and Robert W. Baker, *The Psychiatric Mental Status*
10 *Examination* 4 (Oxford University Press 1993) (emphasis in original). Therefore,
11 characterizing Dr. Lemberg's conclusions as largely based on plaintiff's subjective
12 statements fails to account for the objective finding in the MSE.

14 B. Treating physician, Dr. Michael W. Johnson. M.D.

15 Dr. Johnson provided an opinion regarding plaintiff's ability to function on June 3,
16 2011 (*see* Tr. 394-95; *see generally* Tr. 392-95). He indicated his opinion that she
17 suffered from anxiety; panic attacks; agoraphobia; and bipolar disorder (*see* Tr. 394). He
18 indicated that she had specific limitations with respect to following instructions and he
19 specified that her limitation with respect to interacting with people was "severe" (*see id.*).
20 When asked to indicate on the form how many hours per week that plaintiff was capable
21 of working, he checked the box for 0 hours, indicating that she was "unable to
22 participate" (*see id.*). He also indicated that plaintiff suffered from limitations in activities
23 related to preparing for work and looking for work, including her agoraphobia and her

1 memory issues (*see id.*). Again, he indicated that the amount of time that she could
2 engage in these activities was zero hours, indicating that she was “unable to participate”
3 (*see id.*). Dr. Johnson opined that plaintiff’s condition likely would limit her ability to
4 work and look for work on a permanent basis (*see Tr. 395*).

5 The ALJ gave “less weight” to the opinions of Dr. Johnson for two stated reasons
6 (*see Tr. 23*). First, the ALJ found that Dr. Johnson’s opinion “was based on a brief
7 treatment relationship, which was insufficient to assess the claimant’s functional
8 limitations,” noting that Dr. Johnson rendered his opinion at his first office visit (*see id.*).
9

10 Again, as the ALJ relied for her RFC determination on the opinions of state
11 agency medical consultants who had no opportunity to assess firsthand plaintiff’s
12 limitations, and because plaintiff’s impairments are mental impairments, this reason is
13 not a legitimate reason to discount the opinions of plaintiff’s treating physician in favor
14 of the opinions of nonexamining doctors. *See Lester, supra*, 81 F.3d at 830 (citations
15 omitted) (an examining physician’s opinion is “entitled to greater weight than the opinion
16 of a nonexamining physician”); *see also* 20 C.F.R. § 404.1527(c)(1) (“Generally, we give
17 more weight to the opinion of a source who has examined you than to the opinion of a
18 source who has not examined you”).
19

20 The only other reason offered by the ALJ for her failure to credit fully the
21 opinions of Dr. Johnson was her finding that “[b]ecause the treatment relationship was so
22 brief, Dr. Johnson must have relied heavily on the claimant’s subjective report of her
23 symptoms” (*see Tr. 23*). Again, the ALJ provides no evidence for her finding that
24 plaintiff’s treating physician relied heavily on plaintiff’s subjective reports other than the

1 fact that he provided his opinion on his first examination of plaintiff. This is not
2 substantial evidence in support of this finding. Again, the ALJ appears not to have made
3 a logical inference, but instead appears to be speculating. *See* SSR 86-8, 1986 SSR
4 LEXIS 15 at *22 (an ALJ may not speculate).

5 (2) **Whether or not the ALJ's errors were harmless.**

6 A. Dr. Lemberg

7 Dr. Lemberg opined that plaintiff "cannot perform work activities on a consistent
8 basis or complete a normal workweek without problematic interruption from her
9 psychiatric conditions after working for a period of time" (*see* Tr. 382). Dr. Lemberg
10 indicated that she anticipated that plaintiff "would have significant difficulty dealing with
11 the usual stress encountered in a competitive work environment" (*see id.*).

12 The ALJ failed to incorporate these limitations into plaintiff's RFC (*see* Tr. 19).
13 Had the ALJ done so, plaintiff's RFC would have been determined to be very different
14 and likely would have led to a finding of disability. Therefore, the ALJ's error in her
15 review of the opinions of Dr. Lemberg is not harmless error.

16 B. Dr. Johnson

17 Dr. Johnson opined that plaintiff was not capable of working any hours per week
18 due to her inability to follow instructions and her severe limitation interacting with
19 people (*see* Tr. 394). Obviously, had these opinions been credited fully, plaintiff's RFC
20 would have been determined to be very different, and she likely would have been found
21 to be disabled. Therefore the ALJ's error in the evaluation of the opinions of Dr. Johnson
22 is not harmless error.

CONCLUSION

Based on the stated reasons and the relevant record, the Court **ORDERS** that this matter be **REVERSED** and **REMANDED** pursuant to sentence four of 42 U.S.C. § 405(g) to the Acting Commissioner for further proceedings consistent with this Order.

JUDGMENT should be for plaintiff and the case should be closed.

Dated this 23rd day of September, 2014.

J. K. Ward Creative

J. Richard Creatura
United States Magistrate Judge